Supreme Court, U. S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

No. 79-215

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOEL H. DARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
R. RUSSELL MATHER
Attorneys
Department of Justice
Washington, D.C. 20530

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	5
Conclusion	13

CITATIONS

Cases:

Goldberg v. *United States*, 425 U.S. 94	11
Smith v. *United States*, 348 U.S. 147	6
United States v. *Candelaria-Gonzalez*, 547 F. 2d 291	8
United States v. *Catalano*, 491 F. 2d 268, cert. denied, 419 U.S. 825	10
United States v. *Condor*, 423 F. 2d 904, cert. denied, 400 U.S. 958	12
United States v. *Hall*, 552 F. 2d 273	12
United States v. *Harris*, 542 F. 2d 1283, cert. denied, 430 U.S. 934	12
United States v. *Larson*, 555 F. 2d 673	12
United States v. *McDonald*, 576 F. 2d 1350, cert. denied, No. 78-1156 (Mar. 20, 1979)	8
United States v. *Nickell*, 552 F. 2d 684, cert. denied, 436 U.S. 904	9
United States v. *Pinkey*, 548 F. 2d 305	8
United States v. *Polizzi*, 500 F. 2d 856, cert. denied, 419 U.S. 1120	10

Cases—Continued

	Page
United States v. *Pomponio*, 429 U.S. 10	12
United States v. *Prieto*, 505 F. 2d 8	10
United States v. *Smaldone*, 544 F. 2d 456, cert. denied, 430 U.S. 967	11
United States v. *Snow*, 537 F. 2d 1166	10
Weatherford v. *Bursey*, 429 U.S. 545	11, 12

Statutes and rules:

Jencks Act, 18 U.S.C. 3500	2, 8
18 U.S.C. 3500(a)	2
18 U.S.C. 3500(b)	3, 9
18 U.S.C. 3500(e)	3, 11
26 U.S.C. 7203	4
Fed. R. Crim. P. 30	12

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-215

JOEL H. DARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 597 F.2d 1097.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1979. The court of appeals denied a petition for rehearing on June 13, 1979 (Pet. App. B).

The petition was filed on August 9, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court gave petitioner an adequate opportunity to present his defense.

2. Whether the trial court improperly interrogated the witnesses.

3. Whether the trial court correctly rejected petitioner's request, pursuant to 18 U.S.C. 3500, to order the government to turn over the case report of a government agent who testified at trial.

4. Whether the trial court correctly refused to file returned subpoenas served on government witnesses as part of the public record prior to trial.

5. Whether the trial court correctly refused to instruct the jury that an alleged partnership existed as a matter of law.

6. Whether the trial court correctly instructed the jury on the issue of willfulness.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part, as follows:

> § 3500. *Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the

[1] No timely application for an extension of time was filed. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

> possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of failing to file his income tax returns for 1973 and 1974, in violation of 26 U.S.C. 7203. The trial court sentenced him to five months' imprisonment on the first count, suspended the execution of a one-year term on the second count, and placed petitioner on three years' probation.

The evidence adduced at trial showed that during the prosecution years petitioner was a self-employed certified public accountant. He also taught accounting courses at Tennessee State University and was a part-time student at the YMCA night law school in Nashville (Tr. 82).[2] At the trial, the government established that petitioner had gross income of $36,331.10 and $40,779.22 from his accounting practice in 1973 and 1974, respectively (see, *e.g.*, Tr. 68-69), and received a $5,420 salary from Tennessee State in 1973 (Tr. 78-82). Although his gross income far exceeded the minimum filing requirements, petitioner did not file an income tax return for either year until 1976, after he became aware that he was the subject of a criminal investigation by the In-

[2] "Tr." refers to the trial transcript. "GX" and "DX" respectively refer to government exhibits and defense exhibits introduced at trial.

ternal Revenue Service (Tr. 135, 141). Petitioner conceded that he had sufficient gross income to require the filing of tax returns during the years in question and that he understood his obligation to file the returns. His sole defense at trial was that his failure to file had not been willful because the voluminous nature of his business and personal records prevented him from accurately computing his taxable income in time to meet the filing deadlines.

ARGUMENT

1. Petitioner first argues (Pet. 6-12) that the trial court did not give him an adequate opportunity to present his defense. At trial, petitioner testified that he conducted his accounting practice as a partnership (Tr. 184). On petitioner's motion (Tr. 141, 188), his individual income tax returns (DX 7) for 1973 and 1974, which were filed in September 1976, were admitted in evidence. At trial, petitioner's attorney showed the returns to petitioner and attempted to ask him what amount of partnership income was reflected on his individual income tax returns (Tr. 188). The district court precluded this line of questioning, however, stating that petitioner was not being charged with underreporting his income (Tr. 188-189).

Petitioner argues (Pet. 8-9) that the district court should have permitted him to testify as to the amount of income he received from the alleged partnership in order to counteract evidence presented by the government which suggested to the jury that his

gross income from his accounting practice was greater than it actually was, and so that the jury could compare the taxable income petitioner received to his gross income in its consideration of whether he acted willfully. Apart from the immateriality of the proposed testimony, it did not challenge the accuracy of the government's evidence or raise any issue of disputed fact. In order to establish petitioner's gross income for the years at issue, the government introduced into evidence a list of payments received from various clients (GX3)—a list that petitioner had supplied to the government during the investigation (Tr. 62-64, 68-69, 76). The government then called as witnesses the individuals who had made payments to petitioner during the years in question (see, *e.g.*, Tr. 89-105, 108-112, 117-122) for the purpose of corroborating petitioner's admission as to his gross income (see Tr. 270-271; *Smith* v. *United States*, 348 U.S. 147, 151-159 (1954)). Thus, the witnesses' testimony was entirely in accord with petitioner's own documentation of his gross income.

However, even on the assumption that this procedure might have misled the jury into believing that petitioner's gross income was more than it actually was, any confusion was dispelled by the cross-examination conducted by petitioner's counsel. That cross-examination established that the individual witnesses merely corroborated the figures on the list (see Tr. 89-105, 108-112). There was accordingly no need for petitioner to testify as to the income he received from the alleged partnership in order to counteract

any impression that his gross income was greater than it actually was.

At all events, there was evidence before the jury as to petitioner's income during the years in question. Petitioner was permitted to introduce into evidence his individual income tax returns for 1973 and 1974 (Tr. 188; DX 7). Accordingly, petitioner was not prejudiced by the trial court's refusal to permit him to state what amount of partnership income was reflected on his individual income tax returns.[3]

Contrary to petitioner's further claim (Pet. 9-12) the trial court did not err in excluding from evidence a portion of petitioner's records. The evidence which he was allowed to present (his "time diaries" (DX 10)) and the testimony of his wife, his secretary, and himself relating to the hours he worked, the time he spent attempting to organize his records, and the detailed nature of his records (see, *e.g.*, Tr. 174-181, 183-209, 242-250)), was sufficient to establish his point, *viz.*, that his recordkeeping system was cumbersome and complicated. Although the trial court excluded petitioner's "cash diaries" from evidence, they were not crucial to his defense. To the contrary, petitioner offered them as an additional illustration of the "meticulousness" with which he kept his records (Tr. 206).

---

[3] Petitioner asserts (Pet. 8-9) that the tax returns were not examined by the jury. But there is nothing in the record which suggests that the jury was precluded from examining the tax returns. Nor was petitioner's counsel prevented from bringing the information contained in the tax returns to the jury's attention in closing argument had he so desired.

2. Contrary to petitioner's contention (Pet. 12), the trial court's interrogation of witnesses and its other conduct of the trial was proper (see, *e.g.*, *United States* v. *McDonald*, 576 F.2d 1350 (9th Cir. 1978), cert. denied, No. 78-1156 (Mar. 20, 1979); *United States* v. *Pinkey*, 548 F.2d 305, 308 (10th Cir. 1977); *United States* v. *Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977)). Indeed, the court instructed the jury that its participation in the case was to have no bearing on their evaluation of the case (Tr. 23-24, 337-338). While the court's inquiry (Tr. 210) whether petitioner's records were not in shape because he "elected to spend * * * time making money off of somebody else and not keep your own books up" perhaps could have been more carefully worded, the court of appeals correctly concluded that, in light of the overwhelming evidence of petitioner's guilt, that isolated question did not affect the fairness of petitioner's trial (Pet. App. 26).

3. Petitioner further argues (Pet. 15-16) that the trial court erred in refusing to direct the government to turn over to the defense, pursuant to its request under 18 U.S.C. 3500, the case report of Special Agent Hollingsworth, who testified for the prosecution. At the conclusion of Agent Hollingsworth's direct testimony, petitioner's counsel requested production of the agent's case report (Tr. 145), stating that government counsel "has provided us with all statements that this witness has entered in his file pertaining to conversations with Mr. Dark, and what he says Mr. Dark said" and that "we are entitled to

any other statements he may have in the file concerning his investigation of this matter that the government relied on" (Tr. 145-146).

But the Jencks Act does not require the government to turn over everything upon which the government has relied, but only so much of a witness's statement as "relates to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)). Here, the prosecutor stated that the government had turned over everything relating to the subject matter of the witness's direct testimony (Tr. 146). Rather than challenge this assertion and attempt to establish the existence of any additional Jencks Act material through cross-examination of the witness, petitioner indicated that it had no questions for the witness (Tr. 146). Petitioner therefore failed to establish that the government had not complied with the Jencks Act. See *United States* v. *Nickell*, 552 F.2d 684, 689 (6th Cir. 1977), cert. denied, 436 U.S. 904 (1978).

At all events, even on the assumption that the agent's report contained material which related to the subject matter of his testimony and which was not turned over to the defense, the government's failure to produce such material could not have prejudiced petitioner under the particular circumstances of this case. Here, Special Agent Hollingsworth testified only that petitioner's tax returns for 1973 and 1974 had not been timely filed (Tr. 135, 137, 139-141, 144); that petitioner had sufficient gross income in each year to require him to file tax returns (Tr.

135-139); that he had interviewed all of the petitioner's clients whom he was able to locate in an attempt to verify the amount of petitioner's gross income for the years in question (Tr. 144-145); and that petitioner had told him that he had failed to file his returns on time because "he had been busy with his clients' business, and that his books and records were in a mess" (Tr. 141). Petitioner conceded at trial that he was a person required to file tax returns (Pet. 6; Tr. 281, 303, 309) and that he failed to file the tax returns at issue (Tr. 194, 209). His defense was only that his failures to file were not willful because he kept such voluminous records that it was impossible for him to extract therefrom the figures necessary for inclusion on his tax returns in time to enable him to file his returns by the due dates (Tr. 192, 194, 204, 209-211, 299-303). Agent Hollingsworth's testimony was therefore entirely consistent with petitioner's defense.

It is well established that a failure to comply with the requirements of the Jencks Act should be excused only where it is clear that the defense was not prejudiced by the failure. *United States* v. *Snow*, 537 F.2d 1166, 1168 (4th Cir. 1976). The purpose of the Act is to provide the defense with the means of impeaching government witnesses by means of prior inconsistent statements. *United States* v. *Catalano*, 491 F.2d 268, 274 (2d Cir.), cert. denied, 419 U.S. 825 (1974); *United States* v. *Polizzi*, 500 F.2d 856, 893 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *Prieto*, 505 F.2d 8, 11 (5th Cir. 1974);

United States v. *Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), cert. denied, 430 U.S. 967 (1977). Hence, this Court has observed that the harmless error doctrine must be strictly applied in Jencks Act cases. *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976). Here, however, there was no reason to impeach Agent Hollingsworth's testimony because it was in accord with petitioner's theory of defense. It is difficult to see, therefore, how petitioner could have been prejudiced by any failure to comply with the Jencks Act with respect to the agent's report.[4]

4. Petitioner also argues (Pet. 19) that the district court erred in refusing to file as part of the public record prior to trial returned subpoenas served on government witnesses. There is, however, no such requirement, which would subvert the policy of the Rules against requiring pretrial disclosures of the identities of witnesses. At all events, petitioner cannot claim that he was prejudiced by the trial court's action because he had no constitutional or statutory right to discovery of the names of potential government witnesses.[5] See *Weatherford* v. *Bursey*, 429

---

[4] There is, accordingly, no need for this Court to decide whether the court of appeals correctly concluded that "Agent Hollingsworth's written case reports are not his 'statements' under 18 U.S.C. § 3500(e), and the trial court was under no obligation to examine the file *in camera*" (Pet. App. 25), or to determine whether the decision below with respect to these issues conflicts with the cases cited by petitioner (see Pet. 16-17).

[5] Petitioner argues (Pet. 18-20) that the court applied a "double standard" because it did not require the government's returned subpoenas to be filed. There is, however, nothing in

U.S. 545, 559 (1977); *United States* v. *Larson*, 555 F.2d 673, 676 (8th Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1291 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Condor*, 423 F.2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970).

5. Petitioner further challenges (Pet. 21) the district court's failure to instruct the jury that petitioner's alleged partnership with William Jordan existed as a matter of law. But petitioner did not request such an instruction (see Rule 30, Fed. R. Crim. P.). At all events, the existence of the partnership was disputed (Tr. 254-260) and was therefore a question of fact for the jury (accord, *United States* v. *Hall*, 552 F.2d 273, 275 (9th Cir. 1977)). Moreover, the existence of the partnership had no bearing on petitioner's defense, but was at most remotely related to the question of his credibility. Compare *United States* v. *Hall*, *supra*, 552 F.2d at 275.

6. Finally, there is no support for petitioner's claim (Pet. 21) that the trial court erred in instructing the jury with respect to willfulness. As this Court held in *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), "willfulness," as used in the felony and misdemeanor provisions of the Internal Revenue Code, means the "voluntary, intentional violation of a known legal duty." The trial court incorporated

---

the record to indicate that he could not have obtained the same treatment for subpoenas served on his behalf if he so requested it.

that definition almost verbatim in its instructions (Tr. 333).[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
R. RUSSELL MATHER
Attorneys

OCTOBER 1979

---

[6] The pertinent portion of the instructions given by the court was as follows (Tr. 333):

> There is no necessity that the government prove that the defendant had any intention to defraud it or to evade the payment of any taxes by the defendant's failure to file, to be willful, under the provisions of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law.
>
> Willfulness in this context simply means a voluntary, intentional violation of a known legal duty.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301958 98